IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1080

MABEL DARCEL LOVELESS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS, MARYLAND

WILLIAM A. FRANCH,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Citation of Opinion Below

Mabel Darcel Loveless v. State of Maryland, 39 Md. App. 563, 387 A.2d 311 (1978), *cert. denied*, ___ Md. ___, No. 301, Sept. Term, 1978 (Oct. 20, 1978).

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STATEMENT OF JURISDICTION

The order sought to be reviewed by this Petition was entered on October 20, 1978, by the Maryland Court of Appeals denying Appellant's Petition for a Writ of Certiorari to the Court of Special Appeals. The Court of Special Appeals affirmed the denial of Appellant's Motion to Dismiss on June 12, 1978. July 12, 1978, Appellant filed a Petition for Reconsideration which was denied by the Court of Special Appeals on September 5, 1978. On September 7, 1978, the mandate was issued.

This Petition for Writ of Certiorari is authorized by 28 U.S.C. Section 1257(3) and is filed pursuant to 28 U.S.C. Section 1201(d) and Supreme Court Rule 22(1) permitting ninety days from the final order of the highest state court in which to file the Petition.

QUESTIONS PRESENTED

I. Whether the double jeopardy clause of the Fifth Amendment bars reprosecution of the Appellant after Appellant's mistrial motion was granted, however, when the Appellant's mistrial motion was necessitated by prosecutorial overreaching.

II. Whether the Deputy State's Attorney's disobeyance of a pre-trial direct court order which would be contumacious conduct is sufficient misconduct to be deemed prosecutorial overreaching.

III. If no overreaching is present, whether defense attorney's mistrial motion was required to preserve objection for appellate review and, thus, cannot be deemed a waiver of double jeopardy protection. If it is not a waiver, whether the mistrial should be examined on the basis of manifest necessity.

IV. Whether the double jeopardy clause bars reprosecution because the trial judge failed to take the steps required of him in determining need for mistrial.

V. Whether the totality of the circumstances is sufficient for the double jeopardy clause to bar reprosecution.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V, Double Jeopardy Clause:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ."

STATEMENT OF THE CASE

Mabel Darcel Loveless, Petitioner was indicted on four counts: conspiracy to commit murder, attempted murder, a second conspiracy to commit murder, and murder. Her trial was held in the Circuit Court for Anne

Arundel County, Maryland located in Annapolis, Maryland.

On the evening of the scheduled trial date, March 8, 1977, then Chief Judge Evans held a chambers conference to discuss pretrial matters raised by Petitioner's counsel. The defense attorneys expressed their concern that during examination of prosecution witnesses, someone would mention the fact that the main prosecution witness, George Hendricks, had been given a polygraph examination. Mr. Hendricks' testimony was anticipated as being a critical part of the State's case and the defense feared that revealing the polygraph examination might prejudice the defense of the case. Protection against this occurring was requested.

In chambers, this subject was discussed among Judge Evans, the Deputy State's Attorney prosecuting the case, and the defense counsel. The conclusion was reached that the Deputy State's Attorney would instruct the police officers who were going to testify not to mention the polygraph examination. The court ordered the Deputy State's Attorney to do so, and he agreed. The defense deemed this to be adequate protection that would permit cross-examination of the prosecution witnesses without danger that the polygraph association would be revealed. The record reflects that the Deputy State's Attorney never mentioned, until the Motion to Dismiss four months later, that he had any problem in accomplishing this court order.

The trial proceeded. Two days of testimony were taken. One the second day of trial, a police officer was testifying on behalf of the State. On cross-examination, defense counsel, relying on the protection sought and received, asked an inauspicious question. In response, the officer referred to the time Mr. Hendricks spent with the polygraph operator. The Deputy State's Attorney first realized what had transpired and interrupted the

proceedings. Counsel approached the bench and the defense counsel moved for a mistrial.

A conference was held concerning the events of the pre-trial order and the trial testimony. During the discussion, the officer who made the polygraph reference sat in the courtroom shaking his head indicating that he had never received instructions from the Deputy State's Attorney not to refer to the polygraph. The trial judge never suggested the options open to the Appellant as to continuing the trial or discharging the jury.

After a recess, then Chief Judge Evans delivered his opinion granting Petitioner's mistrial motion. He reiterated that during the pre-trial conference the Deputy State's Attorney was ordered and agreed to instruct the police officers not to make a polygraph reference. Further, the judge found that the officer was not so advised. Under the circumstances, the judge found prejudice resulted as a direct result of the Deputy State's Attorney's failing to comply with his order.

On July 8, 1977, once a new trial was scheduled for September, defense counsel filed a Motion to Dismiss the indictment raising the defense of double jeopardy. Numerous affidavits were filed by counsel concerning the events which led to the mistrial. In the defense counsel affidavits it is indicated that there was sufficient time to accomplish the court order and counsel never was notified by the prosecutor that there had been difficulty in carrying out the directive. The Deputy State's Attorney's affidavit admits that he was ordered by the court to instruct the police officers and that the particular police officer indicated that he never was instructed pursuant to the pre-trial order.

On August 17, 1977, Chief Judge Childs, in the Circuit Court for Anne Arundel County, held a hearing on the Motion to Dismiss. The Judge declined to take testimony as to the anxiety, expense, ordeal, etc., of the

Petitioner. Defense counsel made a proffer as to what that testimony would be if given. Judge Childs made a finding that Judge Evans did direct the Deputy State's Attorney to instruct his witnesses as indicated and the police officer was not so instructed by the Deputy State's Attorney. He also found that the mention of the polygraph in the trial, to him, did not seem prejudicial and could have been cured by a cautionary instruction. The Motion to Dismiss was denied. Petitioner appealed this ruling. The Petitioner has remained out on bond pending resolution of the appellate process.

The initial appeal was to the Maryland Court of Special Appeals. Appellant's brief raised the same questions sought to be reviewed here. On June 12, 1978, the Court affirmed the denial of Appellant's Motion to Dismiss. The Court recognized the "prosecutorial overreaching" exception to the principle that a defendant's mistrial motion waives the double jeopardy objection to retrial. The court focused on a rationale that the mention of the polygraph association was of little significance. The mistrial that resulted, the Court concluded, was not due to overreaching. Never did the Court examine the Deputy State's Attorney's conduct in not obeying the direct court order. The court never discussed the further contention that even if the court found no overreaching, the test should be manifest necessity because the Maryland law gives the defendant no choice but to move for a mistrial to preserve the question for appellate review. Consequently, the mistrial motion cannot act as a double jeopardy objection waiver. Nor did the Court inquire as to whether the appropriate steps were taken by the trial judge or whether all the events, when considered together, bar a reprosecution.

July 12, 1978, Appellant petitioned the Court of Special Appeals for a reconsideration. The petition was denied September 5, 1978. The mandate issued from the

court September 7, 1978. Appellant pursued the next appellate step.

A Petition for Writ of Certiorari was filed in Maryland's highest court, the Court of Appeals. On October 20, 1978, the Court of Appeals denied Appellant's Petition for Writ of Certiorari.

Petitioner now files a Petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING THE WRIT

I. The United States Supreme Court has never addressed the question of the degree to which a prosecutor's misconduct, as opposed to mere error, constitutes overreaching. Decisions among state and federal courts conflict over the standard defining "prosecutorial overreaching" and the type of prosecutorial conduct required to satisfy that standard.

The general double jeopardy principle that prosecutorial overreaching leading to a mistrial, even at the request of the defendant, will bar retrial has become well-established. *Dinitz v. United States,* 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976); *United States v. Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). The Supreme Court has never explained the type of misconduct sufficient to meet the general test.

A review of the Supreme Court cases reveals a distinction that is drawn between prosecutorial error and prosecutorial misconduct. *Dinitz v. United States,* 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). There, the Court determined that mere error without bad-faith or intent to harass the defendant or obtain a more favorable opportunity to convict would not satisfy the prosecutorial overreaching requirements. The misconduct test remained unclear as to whether it differs. The prosecutorial error doctrine continued to develop.

In *Lee v. United States,* 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977), the error was an improperly drafted indictment which was, at best, negligent. No double jeopardy attached. A similar conclusion was the basis of *Illinois v. Somerville,* 410 U.S. 450, 96 S. Ct. 1066, 35 L. Ed. 2d 425 (1973), wherein an erroneous omission of an element of the offense in an indictment, discovered during trial led to a mistrial. Justice Rehnquist, writing for the majority, suggested the error — misconduct distinction by indicating that this was not a case where the actions of the prosecutor were tantamount to prosecutorial misconduct. 410 U.S. at 464. The Court has never addressed the question of what constitutes sufficient conduct to be deemed prosecutorial misconduct. The case *sub judice* raises that issue.

State and federal cases attempting to apply the prosecutorial overreaching rule have split in interpretating the applicable standard. Many have followed the error rationale and some have developed a misconduct approach, with conflicting results. Few cases, if any, make the error — misconduct distinction clear. Whichever test a court adopts seems to be the only one it recognizes as the interpretation of the general rule.

Cases finding that prosecutorial overreaching requires error accompanied by bad faith or intent to provoke a mistrial, harass the defendant, or obtain a better chance in a new trial are frequent. Often they concern a remark in the prosecutor's opening statement or closing argument. *United States v. Rumpf,* 576 F.2d 818 (10th Cir. 1978); *United States v. McKoy,* 448 F. Supp. 826 (E. D. Pa. 1978); *Piesik v. State,* 572 P.2d 94 (Alaska 1977); *State v. Manning,* 224 N.W.2d 232 (Ia. 1974); *People v. Wilson,* 48 Ill. App. 3d 885, 363 N.E.2d 374 (1977); *State v. Wesley,* 347 So. 2d 217 (La. 1977). Each concludes that the remark was mere error without the additional element. Hence, there was no double

jeopardy bar to retrial. The conflict appears when other cases are examined.

There is the situation when the prosecutor starts a trial failing to have the necessary proof of certain facts. In *United States v. Romano,* 482 F.2d 1183 (5th Cir. 1973), the prosecutor mentioned in opening argument nine other crimes for which he had already admitted not having proof of a connection to the defendant. The court concluded, however, that this was an inadvertent reference which led to the mistrial. There seems to be a conflict with *Downum v. United States,* 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963), where the prosecutor started trial without knowing whether his key witness would appear. When the witness failed to appear, a mistrial was declared. This was deemed prosecutorial overreaching. Thus, under a similar set of facts, courts have concluded that one is error and the other prosecutorial misconduct.

Further conflict appears between certain jurisdictions adopting a definition of the misconduct standard in that some find gross negligence sufficient and others require deliberate misconduct. *United States v. Wilson,* 534 F.2d 76 (6th Cir. 1976), recognized the error-misconduct distinction and the definitional question of gross negligence or intentional misconduct. The question was never answered because the record was inadequate. In *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976), the Fifth Circuit expressly adopted the gross negligence test as satisfying the definition of overreaching. Naturally, intentional misconduct would be more than satisfactory to be deemed overreaching. In *Kessler,* the prosecutor's attempt to introduce a rifle which could not be attributed to the defendant through the conspiracy theory was overreaching. The gross negligence test was adopted in *United States v. Martin,* 561 F.2d 135 (8th Cir. 1977). The prosecutor read to the

jury from the defendant's grand jury testimony including irrelevant and prejudicial remarks. The court concluded that this conduct was, at least, gross negligence from which the court drew an inference of bad faith. *Id.* at 140. *See State v. O'Keefe,* 135 N.J. Super. 430, 343 A.2d 509 (1975) (deeming inexcusable prosecutorial neglect sufficient by seeking mid-trial continuance). The conflict in assessing prosecutorial conduct and deeming it error or misconduct seems epitomized by the Supreme Court of Pennsylvania. In *Commonwealth v. Bolden,* 472 Pa. 602, 373 A.2d 90 (1977), the plurality decision expressly adopted gross negligence as the applicable standard. The test was whether the prosecutor failed to satisfy professional standards. Yet, in *Commonwealth v. Potter,* ___ Pa. ___, 386 A.2d 918 (1978), the plurality opinion expressly rejects the gross negligence test in favor of a requirement that the defendant show deliberate prosecutorial misconduct. Consequently, the split in authorities analyzing which test is to apply and whether conduct by the prosecutor is error or misconduct is divided by an amorphous line.

The conflict is quite apparent between two cases with similar facts where the prosecutor had agreed not to bring out certain information. In *United States v. Rumpf,* 576 F.2d 818 (10th Cir. 1978), the prosecutor agreed not to introduce certain prejudicial evidence. During opening statement, the prosecutor mentioned the forbidden evidence and a mistrial was declared. This was deemed error without bad-faith. In contrast, *United States v. Broderick,* 425 F. Supp. 93 (S.D. Fla. 1977), concerned an agreement between the prosecutor and defense not to ask certain questions at the trial. When the prosecutor inquired into the forbidden subject, a mistrial was declared. This was deemed intentional or deliberate misconduct.

In addition, a logical conflict in applying the error plus bad-faith or intent to provoke a mistrial rationale exists. "Error" normally connotes a mistake or unintentional act. The additional element juxtaposes two concepts which are inconsistent. If there is bad-faith or intent to create a mistrial, there no longer is "error", but intentional conduct. The case at bar raises the issue of to what degree must the prosecutorial conduct be intentional, that is, grossly negligent or deliberate, to be overreaching.

In the present case, Appellant asserts that the Deputy State's Attorney's conduct was, at least, grossly negligent or intentional misconduct. Maryland law is clear that misconduct includes disobeying a direct court order when one is aware of the order. *Goldsborough v. State,* 12 Md. App. 346, 278 A.2d 623 (1971) (subtle defeat of court's mandate is contempt). *In Re Kinlein,* 15 Md. App. 625, 292 A.2d 749 (1972), held an attorney in contempt for failing to carry out a pre-trial order not to discuss the case with the press. These cases indicate that the only intent required is to perform the offending act. Good-faith, lack of deliberation, or mere negligence is no excuse, but may mitigate punishment. This rule must be considered with the principle from *Maness v. Meyers,* 419 U.S 449, 95 S. Ct. 584, 42 L. Ed.2d 574 (1975), that all orders of court, especially those issued during trial, require prompt and complete compliance. *Id.* at 458-59. Thus, the failure of the Deputy State's Attorney to comply with the pre-trial order to instruct his police officer witnesses not to mention the polygraph matter was an intentional act which rendered him subject to contempt of court. This was a failure to satisfy his professional responsibility as an officer of the court. It was not a mere error without prior warning as occurred in *Muller v. State,* 478 P.2d 822 (Alaska 1971) (prosecutor unaware of prior court order to different prosecutor; failure to obey deemed error).

The Supreme Court should grant a writ of certiorari on the above basis to resolve the conflict in standards defining prosecutorial overreaching in light of the special circumstances of this case which indicate intentional conduct by the prosecutor rendering his actions grossly negligent or deliberate. This issue has never been considered by the Court previously.

II. The Supreme Court has never investigated whether the defendant's mistrial motion acts as a waiver of the double jeopardy protection if the defendant has no choice but to move for a mistrial. This issue would be one of first impression.

Even if the court concludes that the Deputy State's Attorney's conduct did not constitute overreaching, then the mistrial must be examined according to the established double jeopardy criteria of whether the mistrial motion waived objection to reprosecution and, if not, then was there manifest necessity for the mistrial.

The waiver question is difficult to resolve in light of other Maryland authority to the effect that the defense had no choice, under the circumstances, but to move for mistrial. *Wilhelm v. Hadley,* 218 Md. 152, 146 A.2d 22 (1958).[1] If no mistrial motion is made, the objection to the prejudicial conduct or remark is not preserved for appellate review. *Id.*; 3 J. Poe, *Pleading and Practice,*

[1] In *Wilhelm v. Hadley,* 218 Md. 152, 146 A.2d 22 (1958), when considering the misconduct of counsel in questioning a witness, the Court expressed the view that when allegedly prejudicial misconduct occurs, a mistrial motion is essential, or objection to the conduct is waived:

> "'Moreover, the view has been taken that the injured party must at once move that a mistrial be declared, for the reason, as stated, that he should not be permitted to "speculate" upon the effect of the misconduct.'" 146 A. at 27-28.

See Morrow v. United States, 101 F.2d 654, (7th Cir. 1939), *cert. denied,* 307 U.S. 628 (1939) (rule to this same effect stated).

Pr. Section 347A (6th ed. H. Sachs, Jr. 1975). This requirement conflicts with the waiver rationale which is predicated upon the defendant having control over his fate as to whether he may continue the trial preserving an objection for appellate review or have a new trial without placing him in double jeopardy. *Dinitz v. United States,* 424 U.S. 600, 608-09, 96 S. Ct. 1075, ——, 47 L. Ed.2d 267, 274-75 (1976). Under Maryland law, there is no real choice as long as the defendant wants to preserve the question for appellate review. The defendant loses his control in order to protect his fundamental rights on appeal. Consequently, no waiver can be inferred from the mistrial motion.

In considering this question, it must be noted that the benefit of the doubt should be given to the defendant, that is, against waiver, if the waiver is uncertain. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). The Court stated:

> ". . . 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and we 'do not presume acquiescense in the loss of fundamental rights.'" 304 U.S. at 464.

The Court of Special Appeals never discussed the waiver issue. It is a question undecided before by the Supreme Court. Based upon the underlying rationale of the former jeopardy clause, as indicated by *Dinitz,* and the safeguard afforded constitutional rights evidenced by *Zerbst,* it is submitted that the Supreme Court would find no waiver under the circumstances of this case. The mistrial should be evaluated under the manifest necessity doctrine.

III. The action of the trial judge affirmed by the appellate court did not comply with the standards required by the Supreme Court and conflicts with the requirements of the Fourth and Second Circuit Courts of Appeals.

Regardless of whether the prosecutorial conduct in this case is deemed overreaching, double jeopardy may prevent reprosecution because the trial judge made an inadequate inquiry into the options and need for a mistrial. *United States v. Walden,* 448 F.2d 925 (4th Cir. 1971), indicates that where the defendant has no real choice but to move for a mistrial, the granting of a mistrial motion was tantamount to a *sua sponte* mistrial. Consequently, the trial judge was required to inquire into the options open and the need for the mistrial. *See United States v. Grasso,* 552 F.2d 46 (2d Cir. 1977). Failing to carry out this independent judicial responsibility would prohibit retrial. *See United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972).

In *Arizona v. Washington,* 434 U.S. 1305, 98 S. Ct. 2, 54 L. Ed.2d 717 (1978), the Court indicated that as long as the trial judge shows consideration of the double jeopardy ramifications when faced with a mistrial motion and does not act precipitately in granting it, he need not use "talismanic" words in granting the mistrial. As long as manifest necessity appears from the record, then the discretion of the judge will be upheld.

In the instant case, the trial judge was presented with a mistrial motion that, under Maryland law, the defense had to make in order to raise the issue on appeal. The mistrial should be considered as if granted *sua sponte.* Even though the defense and the prosecutor presented their respective positions on the propriety of granting the mistrial, the trial judge did not inquire into alternative courses of action. Nor did the judge or any counsel show concern for the double jeopardy consequences of a mistrial. There was no finding or even an indication from the record that manifest necessity existed. In fact, Chief Judge Childs, in denying Appellant's Motion to Dismiss stated that he felt the mistrial was unnecessary and could have been

cured by an instruction to the jury. The failures of the trial judge, if this ruling is permitted to stand, conflicts with the standards set out in *Walden, Grasso,* and *Lansdown* and is inconsistent with the principles of *Arizona v. Washington.*

IV. The Supreme Court has never examined the totality of circumstances in which the factors of no choice but mistrial motion exists for the defendant, a trivial incident occurs, and the trial judge fails to inquire into alternative solutions combine to invoke the double jeopardy bar to reprosecution.

There is still another manner in which it may be concluded that retrial of the appellant is barred by the double jeopardy clause. This might be termed the totality of the circumstances approach. In *United States v. Walden,* 448 F.2d 925 (4th Cir. 1971), the court discussed the lack of real choice for the defendant but to move for mistrial, the failure of the judge to seek alternatives, hold a hearing, and make findings, in addition to ". . . the nature of the relatively trivial incident that triggered the abortion (of the trial). . . ." 448 F.2d at 930. All these factors, when added together, amounted to compelling reason to find double jeopardy barred retrial.

If in the instant case, the mention of polygraph, under the circumstances, is deemed trivial and insufficient to have caused the mistrial, then the Court can still determine that double jeopardy bars retrial. Certainly, the totality of the trial judge's directive to the Deputy State's Attorney, the failure of the Deputy State's Attorney to comply with the court's directive, the importance the defense placed on the issue such that a safeguard was sought and obtained prior to trial, the findings of two judges that the directive was made and not met with compliance, the misconduct of the State's Attorney or, at least, the gross negligence (or

even just the admitted negligence), the prejudice perceived by the trial judge, the lack of real choice for the defendant, and the lack of investigation into alternatives, no hearing, or findings by the court and the anxiety, expense, and delay experienced by the Petitioner add up to a sum of more than the parts. As a totality, the circumstances warrant a finding that double jeopardy bars reprosecution of the Appellant.

Again, this question has never been before the Supreme Court in this context. The Court of Special Appeals did not discuss this argument.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully urges the Court to issue a Writ of Certiorari to the Court of Special Appeals of Maryland.

Respectfully submitted this _____ day of _____, 197___.

I HEREBY CERTIFY that on this ___ day of _____, 197___, a copy of the foregoing Petition for Writ of Certiorari was mailed to the attorney General's Office, 1 South Calvert Street, Baltimore, Maryland 21202.

_____

WILLIAM A. FRANCH

APPENDIX A

Mabel Darcell Loveless

v.

STATE OF MARYLAND

In the Court of Appeals of Maryland

Petition Docket No. 301

September Term, 1978

(No. 992, September Term, 1977
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judge Eldridge did not participate in the consideration of this petition.

/s/ ROBERT C. MURPHY,
Chief Judge.

Date: October 20, 1978.

APPENDIX B

MANDATE

Court of Special Appeals of Maryland

No. 992, September Term, 1977

Mabel Darcel Loveless

v.

State of Maryland

June 12, 1978 — Opinion by Moylan, J. Judgment affirmed; costs to be paid by appellant.

July 12, 1978 — Petition for Reconsideration filed by counsel for appellant.

September 5, 1978 — Petition for Reconsideration denied by Court.

September 7, 1978 — Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Anne Arundel County

Record	$ 25.00
Stenographer's Costs	$346.00

In Court of Special Appeals:

Filing Record on Appeal	$ 30.00
Printing Brief for Appellant	$518.94
Reply Brief	
Portion of Record Extract — Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee	$ 60.00

Portion of Record Extract — Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, SCT:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this seventh day of September A.D. 1978.

HOWARD E. FRIEDMAN
Clerk of the Court of Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

APPENDIX C

Mable Darcel Loveless

v.

State of Maryland.

No. 992.

Court of Special Appeals of Maryland.

June 12, 1978.

Defendant, being prosecuted for murder and related offenses, claimed that her impending trial would place her for second time in jeopardy in violation of her constitutional rights. The Circuit Court, Anne Arundel County, E. Mackall Childs, J., denied motion, and defendant appealed. The Court of Special Appeals, Moylan, J., held that witness' mention of polygraph operator was not sufficient to have caused a mistrial

nor was it of such overreaching proportions as to bar retrial.

Affirmed.

1. Criminal Law ⇐867

Defendant who has moved for mistrial waives, by that very motion, all objection to a subsequent retrial.

2. Criminal Law ⇐204

If defense is placed in untenable situation where it has no choice but to request a mistrial because of prosecutorial or judicial "overreaching," then the mere fact that defense requested the mistrial will not operate as a waiver of later double jeopardy claims. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law ⇐182, 190

Mere error, judicial or prosecutorial, even where it is grievous enough to cause a mistrial or to cause an appellate reversal, will not bar a subsequent retrial.

4. Criminal Law ⇐867, 1189

Except in those rare instances where prosecution or court has deliberately sabotaged a trial that was going badly, available redress where an irremediable error is recognized in mid-trial is declaration of a mistrial followed by a retrial; the available redress where a reversible error has occurred in a trial which runs its full course and results in a conviction is a reversal followed by a retrial.

5. Criminal Law ⇐161

For double jeopardy purposes, it makes no difference whether former jeopardy runs its full course or is aborted before the verdict. U.S.C.A. Const. Amends. 5, 14.

6. Criminal Law ⇐190

The only time that retrial is barred under double jeopardy principles is when there has been such prosecutorial or judicial overreaching as to have amounted to a deliberate and intentional sabotaging of the earlier trial. U.S.C.A. Const. Amends. 5, 14.

7. Criminal Law ⇐190, 867

Fact that police officer, in response to question on cross-examination put by defendant's counsel at trial for murder and related offenses, mentioned that State's witness had spent a period of time with "the polygraph operator" was not sufficient error to have caused a mistrial nor was it of such "overreaching proportions" as to bar retrial. U.S.C.A. Const. Amends. 5, 14.

8. Criminal Law ⇐695½

Mere mention of a "polygraph" at trial for murder and related offenses could have been cured by appropriate instructions by court at that time. U.S.C.A. Const. Amends. 5, 14.

William A. Franch and Ronald H. Jarashow, with whom were Joseph P. Manck and Goldsborough, Franch & Collett, Annapolis, on the brief, for appellant.

W. Timothy Finan, Asst. Atty. Gen., with whom were Francis B. Burch, Atty. Gen., Warren B. Duckett, Jr., State's Atty., for Anne Arundel County and David R. Cuttler, Asst. State's Atty. for Anne Arundel County on the brief, for appellee.

Argued before GILBERT, C. J., and MOYLAN and MELVIN, JJ.

MOYLAN, Judge.

This case should not be here. It illustrates for the ten thousandth time what happens when everyone overreacts. It typifies the painful procedural hangover that follows initial excess as even the law must ask in the cold light of the morning after, "What do we do now?" In the most basic of terms, a criminal trial was prematurely aborted when everyone pressed the panic button because somebody said a bad word in a courtroom. Upon this grist, the appellate mills may now grind for a season or two.

The appellant, Mable Darcel Loveless, now claims that her impending trial in the Circuit Court for Anne

Arundel County for murder and related offenses will place her for a second time in jeopardy in violation of her constitutional rights guaranteed by the Fifth and Fourteenth Amendments. *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). This particular procedural history will flow more clearly if we begin in the present and move backward.

This appeal is from the ruling of Judge E. Mackall Childs in the Circuit Court for Anne Arundel County denying the appellant's Motion to Dismiss the indictment against her on the grounds of double jeopardy. That motion was made when the State scheduled a retrial in this case for September, 1977. The scheduling of the retrial had followed an earlier mistrial. The appellant first went to trial on these charges on March 8, 1977. Following two days of testimony before a jury, a police officer, in response to a question on cross-examination put by appellant's counsel, mentioned that a State's witness had spent a period of time with "the polygraph operator." Although the jury was carefully screened from observing the scene, legal pandemonium ensued. The appellant moved for a mistrial. The trial judge ultimately granted the motion.

[1] Subject to the narrow limitation yet to be discussed, it is axiomatic that a defendant who has moved for a mistrial waives, by that very motion, all objection to a subsequent retrial. *United States v. Tateo,* 377 U.S. 463, 467, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448, 452 (1964); *United States v. Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *United States v. Dinitz,* 424 U.S. 600, 607-608, 96 S. Ct. 1075, 1079-1080, 47 L. Ed. 2d 267, 273-274 (1976); *Cornish v. State,* 272 Md. 312, 318, 322 A.2d 880; *Jourdan v. State,* 275 Md. 495, 508, 341 A.2d 388; *Baker v. State,* 15 Md. App. 73, 289 A.2d 348; *Bartley and Hill v. State,* 32 Md. App. 283, 289, 362 A.2d 101.

[2, 3] There is one limitation on the foreclosing effect of a defense request for a mistrial. If the defense is placed in an untenable situation where it has no choice but to request a mistrial because of prosecutorial or

judicial "overreaching," then the mere fact that the defense requested the mistrial will not operate as a waiver of later double jeopardy claims. A critical distinction is made, however, between deliberate "prosecutorial or judicial overreaching," on the one hand, and "prosecutorial or judicial error," on the other hand. Mere error, judicial or prosecutorial, even where it is grievous enough 1) to cause a mistrial or 2) to cause an appellate reversal, will not bar a subsequent retrial.

[4, 5] Except in those rare instances where the prosecution or the court has deliberately sabotaged a trial that was going badly, the available redress where an irremediable error is recognized in mid-trial is the declaration of a mistrial followed by a retrial; the available redress where a reversible error has occurred in a trial which runs its full course and results in a conviction is a reversal followed by a retrial. For double jeopardy purposes, it makes no difference whether the former jeopardy runs its full course or is aborted before the verdict. The broad reasoning undergirding this policy decision was cogently set forth by Justice Harlan in *United States v. Tateo, supra,* at 377 U.S. 466, 84 S. Ct. 1589, 12 L. Ed. 2d 451:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the

accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest."

[6] The only time that retrial is barred under double jeopardy principles is when there has been such prosecutorial or judicial overreaching as to have mounted to a deliberate and intentional sabotaging of the earlier trial. *United States v. Jorn, supra,* 400 U.S. at 485, 91 S. Ct. at 557, 27 L. Ed. 2d at 556; *United States v. Dinitz, supra,* 424 U.S. at 611, 96 S. Ct. at 1081, 47 L. Ed. 2d at 276; *Thompson v. State,* 38 Md. App. 499, 502, 381 A.2d 704. See also *City of Tucson v. Valencia,* 21 Ariz. App. 148, 517 P.2d 106 (1973); *State v. Marquez,* 113 Ariz. 540, 558 P.2d 692, 694-695 (1976); *People v. Hathcock,* 8 Cal. 3d 599, 105 Cal. Rptr. 540, 504 P.2d 476 (1973).

[7] In the case now before us, we do not perceive prosecutorial error, if any, sufficient even to have caused a mistrial, let alone of such "overreaching" proportions as to bar retrial. The misadventure that brought about the mistrial in this case is regrettable, but at most venial. Indeed, the exaggerated reaction is as difficult to appreciate as is the occurrence of the event reacted to. On the morning of trial, March 8, 1977, a chambers conference was called by the judge to take up a number of matters. The first item discussed was the questions to be asked on voir dire. A defense request for a change of venue was then discussed and denied. A defense request for a continuance — intertwined with discovery issues — was discussed and denied. The last item on the agenda was a defense request that the judge order the prosecutor to tell his witnesses not to mention that George Hendricks, a State's witness, had taken a polygraph test. The judge so ordered. The conference adjourned and everyone moved into the courtroom where the jury selection process began. At the first break, the Deputy State's Attorney called together his witnesses then present and passed on the admonition about the polygraph test. The State had summoned

sixteen witnesses in all. The Deputy State's Attorney could not later recall whether Detective Staley, who was scheduled to appear on the second day of trial, was present or not. Detective Staley indicated that he had not been present and had not heard the admonition.

On the second day of trial, Detective Staley testified for the State. Nothing untoward happened. Then the cross-examination began. In the course thereof, the following transpired:

> "Q. Alright. Now, how long did you have Mr. Hendricks in custody or were you with him? A. We were with him with the exception of the time he was allowed with his father and the time that he was with our polygraph operator . . . we were with him from one o'clock in the afternoon, well, we had a problem in the afternoon. After we had interviewed Mr. Hendricks, it was . . . ."

[8] With the uttering of the ineffable word "polygraph,"[1] it was as if a rattlesnake had been tossed into

[1] The mere mention of the word "polygraph" — or, worse yet, "lie detector" — seems to have a more leprous quality in the popular mythology of the trial bar than would be indicated by the tone of the few reported decisions dealing with the subject. There, a greater sense of equanimity prevails, recognizing that a relatively new and still experimental scientific technique has not yet received a sufficient level of "general acceptance" in the scientific community to warranty present admissibility, but that work is being done and the possibility of future utility is not forever foreclosed. It is but a specific instance of the broader evidentiary phenomenon of "Relevance and Its Counterweights." In *Rawlings v. State,* 7 Md. App. 611, 256 A.2d 704, we affirmed the discretionary decision of a trial judge not to admit the results of a polygraph test but nonetheless noted "the assertion of some authorities that advances in the science or art of lie detecting are such as to make the results of lie detector tests, when given under proper conditions, acceptable as evidence. See McCormick, *Evidence,* § 174; Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence,* 10 Wayne Law Review 381; and Pfaff, *The Polygraph: An Invaluable Judicial Aid,* 50 A.B.A.J. 1130 (1964)."

a tea party. A bench conference, a defense motion for mistrial opposed by the State, a recess to consider the circumstances, and the final declaration of a mistrial followed in short order. At the later hearing, now before us for review, Judge Childs acutely observed:

> "Frankly, I do not believe that the mere mention of a polygraph could not have been cured by appropriate instructions by the court at that time and the case was permitted to proceed."

We agree with that assessment by Judge Childs. In both *Lusby v. State,* 217 Md. 191, 141 A.2d 893, and *Kelly v. State,* 16 Md. App. 533, 298 A.2d 470, key prosecuting witnesses had gone further. They brought out that they had actually taken "lie detector" tests, whereas in this case the reference was simply to the prosecuting witness's having been with a "polygraph operator." Moreover, the testimony had been elicited by the State's Attorney (in *Lusby*) and by the judge (in *Kelly*), whereas in this case the testimony was elicited in cross-examination by defense counsel. In both *Lusby and Kelly,* it was the holding of the Court that the trial judge had not abused his discretion in refusing to declare a mistrial. The damage in each case was assessed as being capable of ready repair by an appropriate admonition to the jury.

In assessing the nature of the mistake which precipitated the declaration of a mistrial in this case, Judge Childs characterized the testimonial breach as, at most, a slip of the tongue. If the Deputy State's Attorney was in error at all in failing to notify this particular witness of the court's admonition, the failing was one of simple inadvertence or negligence. Indeed, the defense cross-examination elicited the reference to the tabooed subject. Judge Childs pointed out that the examination dealt with "an area which the court feels that the defense had reason to know [was one where] this sensitive testimony may have come to light." If we may analogize to the tort field, if the Deputy State's Attorney here was negligent, the defense was also guilty of contributory negligence (or, perhaps, an

assumption of risk). Even assuming such negligence as would necessitate a mistrial, it would still not be an instance of such prosecutorial overreaching as to bar a retrial. *Lee v. United States,* 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977); *Muller v. State,* 478 P.2d 822, 827 (Alaska, 1971).

In this case, there was a profligate rush to mistrial. The defense overreacted and, in turn, persuaded the trial judge to overreact. In this regard, the defense got more than it deserved. We perceive no prosecutorial error serious enough to have necessitated the mistrial; *a fortiori,* we see nothing remotely approaching the prosecutorial "overreaching" that would be necessary to engage the gears of the double jeopardy clause and to bar a retrial of this appellant.

Judgment Affirmed;
Costs to be paid by Appellant.

APPENDIX D

ORDER

The Defendant's Motion to Dismiss having been filed, memorandum and affidavits having been read and considered, and arguments of counsel having been heard, it is this 17th day of August, 1977.

ORDERED, That the same be, and it is hereby Denied, the Court being of the opinion that the conduct complained of by the Defendant did not constitute prosecutorial overreaching or misconduct which would bar a retrial under the double jeopardy provision of the Fifth Amendment.

s/ E. MACALL CHILDS,
Judge.

APPENDIX E

MOTION TO DISMISS. HEARING HELD

August 17, 1977.

Extract of Opinion of Chief Judge Childs:

My feeling, Gentlemen, is that the facts and circumstances of this case, as I understand them to be from the affidavits filed, that it is correct that Judge Evans did request of the prosecutor to advise the police officers in the case that they not mention polygraph, and apparently it is conceded that the police officer who on cross examination by the defense came out with this mention of the polygraph without mentioning the results. Had not at that time or immediately proceeding, or between the time of the trial and the actual time of testimony, had not been specifically warned by the prosecutor again, and I say again because I accept as true the statement by Mr. Cuttler that in discussing this previously with this particular police officer he is certain that the matter of the seriousness of the mentioning of polygraph was brought up and discussed several times. Now this court can not bring itself to believe that this is an example of prosecutorial misconduct or overreaching which is the topic of the numerous cases mentioned, both in the Supreme Court and in the State courts, which would justify under the circumstances the implication of the principle of double jeopardy. I note first and foremost that this was not on direct examination. It was brought out in testimony on cross examination, in an area which the court feels that the defense had reason to know that this sensitive testimony may have come to light. It was not something that was an apparent purposeful disregard of specific instructions of the court on the part of the prosecutor, and this court is of the feeling that Lusby controls.

Frankly, I do not believe that the mere mention of a polygraph could not have been cured by appropriate

instructions by the court at that time and the case was permitted to proceed. The court also notes that this was the result, the — apparently my predecessor on the bench was swayed by argument of defense counsel on defense motion in spite of the language in Lusby which seems to indicate that the manner in which the polygraph was mentioned is not something which could have tained the entire proceedings and that a simple admonition to the jury could have taken place. I think Lusby actually is authority for that proposition. Why Judge Evans decided otherwise I don't know because I haven't talked to him and apparently there is no written opinion as to why he ruled as he did in the face of our own Court of Appeals in the Lusby case.

Without a doubt this is a case which has attracted a great deal of notoriety. The accusations, if proven, constitute an extremely serious breach of the law. Because of the nature of the charges and the initial publicity, at least, this court feels that a matter so serious as the dismissal of all charges based on a mere lapsus lingui, I'll choose to call it, on the part of the police officer, who perhaps should have known better but forgot, had best be decided by the man power of an appellate court rather than the opinion of one nisi prius judge, who certainly claims no, or lays claims to no policy of infallibility. I think that if an appeal is indicated then the appeal certainly should be taken. It will not thereby, as far as I can tell, be charged against the State as such. It may be, if I'm deemed to be wrong by the appellate court. I do believe that because of the language in Lusby this is a matter which should not be facing us now. Perhaps I'm going over ground that I've previously covered but simply to reiterate, the testimony complained of was elicited on cross examination in an area in which the defense knew was a sensitive one. The results of the polygraph examination were never mentioned. There may be an implication there but the results were not mentioned and as far as I'm able to determine the Lusby case controls under the situation, and the Court of Appeals has held, by virtue of that,

that instructions to the jury could have cured the matter then and there and the case could have proceeded to its result, and for that reason the motion to dismiss the indictments is hereby denied, and the court will sign an order to this effect.

* * * * * *

I hereby certify the aforegoing transcript is a true and bona fide copy of the proceedings held in open court in the case of the State of Maryland v. Mabel Darcel Loveless on the 17th day of August, 1977.

SHIRLEY DUDLEY,
Court Reporter.

APPENDIX F

MISTRIAL — MARCH 9, 1977, OPINION OF THEN CHIEF JUDGE EVANS

COURT'S DECISION

(Court) Gentlemen, I've read the cases you all have referred to and I've given the matter a lot of thought. Preliminarily, how this objection or motion for a mistrial arose is the fact that the officer was questioned as to how long Hendricks, that is George Hendricks, the State's witness, had been in his custody and I think he went into some explanation about taking a statement and he was with them with the exception of the time he was with a polygraph operator and it was at this point that the motion was made. Prior to trial as a preliminary matter, there was . . . this question was raised as to the polygraph matter. It seems that there had been an agreement for . . . between Hendricks and the State that would not oppose his case being

transferred to juvenile court on the condition that he testify for the State and that he also take a polygraph test and prior to trial as a preliminary matter, this question came up because the defense said they wanted to question him as to why he was testifying, what the agreement was. And after some discussion the defense wanted to get in everything except the polygraph test and the State opposed it. The compromise was that they would not be questioned as to the agreement, that the State would also instruct the State's witnesses, that is, the officers that the polygraph should not be mentioned and I gather from the statements of counsel here this morning the officer was not advised as to this. Now, this does not go as to actually whether there was prejudice or not prejudice but this is a preliminary matter. The real question is, was this statement by the officer prejudicial to the defendant's case. The defendant . . . not the defendant, Hendricks, as I see the case at this point, is the heart of the State's case and he is the one that was with the polygraph operator and what would be any inference that the jury might draw from the fact that they heard this mention of polygraph. In other words, would it be prejudicial to the defendant. Now, the State has referred to a case of *Luskin* versus *State* in which there was mention that a polygraph test was given and I might add here the officer didn't mention whether one was given but he mentioned that the . . . he was with a polygraph operator for some time. Of course, I think the only natural inference you could draw from that would be he's with the polygraph operator to take a test. As indicated by the State, he might want a cup of coffee or something . . . if he wanted coffee, I'm sure that the officers would have supplied that without going to the polygraph operator. The next thing is what inference would the jury get from this. Now, the *Luskin* case was decided twenty years ago. It was in 1957 . . . when it was mentioned, the Judge immediately sustained the objection and instructed the jury to ignore the question, that is, that the polygraph test had been given. And this was affirmed by the Court of Appeals. In this case, 1977, it's

twenty years later. And during that period of time and I think the polygraph is in a different light than it was in 1957. It wasn't very well known at that time by the general public and it wasn't very well accepted. Where today, as far as the scientific community is concerned, it has much greater stature and is accepted and as far as the general public is concerned it is much better known and accepted because of the publicity that it has received through the various news media, TV, radio, pictures and what not. So, I think the inference that might be drawn today compared with the one that would have been drawn twenty years ago is quite different. I might add, in the State of Maryland, of course, the law is that the results of the polygraph test are not admissible and it's within the discretion of the Court to determine whether there is prejudice, that is, to the defendant by the mention of this polygraph. And I think, looking at the totality of the circumstances, I feel that there is prejudice to the defendant.

(Mr. Cuttler) Your Honor, at this point, excuse me for interrupting you but you're obviously going to grant the mistrial. . .

(Court) Yeah.

(Mr. Cuttler) — at this point. May I make one request?

(Court) Yes.

(Mr. Cuttler) Could we ask the jurors individually, one at a time, whether they heard from this officer where the defendant had been — because I don't think the way the testimony came out, that they would realize that he had been with the polygraph operator. And I would ask that the Court—

(Court) Well, we played the tape back and it was very clear.

(Mr. Cuttler) I realize that.

(The Court) No, I will deny that request. It was — there wasn't any question that it was mentioned.

(Mr. Cuttler) No, I'm not questioning that it was mentioned, Your Honor, I'm questioning whether there was actual prejudice on the party of the jury. They might not have heard it.

(The Court) No. I don't think that's necessary. You made me forget where I was. But I think for those reasons I will grant the motion for a mistrial.